251(c)(3) simply cannot be reasonably read to deny non-facilities-based carriers access to unbundled network elements or to establish as a precondition to such access the acquisition of one or more physical facilities.

Citations offered by incumbent LECs to the legislative history of the '96 Act for the proposition that unbundled access to network elements is reserved to carriers possessed of one or more physical network components are strained at best. The various legislative language quoted in the incumbent LECs' comments reveals only that the Congress viewed one benefit of such access to be the facilitation of early market entry by carriers that intend to construct and deploy alternate physical networks. No commenter has unearthed in the voluminous legislative background of the '96 Act any suggestion that this was the only benefit the Congress intended to be derived from requiring incumbent LECs to provide unbundled network access. The reason for this is, of course, simple: the Congress did not intend to restrict access to unbundled network elements to facilities-based carriers. If it had so intended, it easily could have, and undoubtedly would have, said as much.

Undaunted, the incumbent LECs argue that allowing non-facilities-based carriers to deploy "virtual networks" comprised of unbundled network elements would conflict with, and indeed, would undermine, the Section 251(c)(4) resale framework. As TRA explained in its comments, this is simply not the case. The Congress, as emphasized above, provided for three separate and discrete vehicles by which prospective competitors could enter the newly-opened local telecommunications market. Deployment of "virtual networks" differs markedly from traditional "total service" resale. In its comments, TRA analogized the difference to that between

what has been broadly characterized in the interexchange market as "switchless" resale and sophisticated "switch-based" resale utilizing intercity private line facilities. Carriers engaged in the former buy "end-to-end" service, generally "minutes of use," and rebrand/reoffer/rebill that precise service. In the latter case, carriers acquire capacity and are free to utilize that capacity to structure their service offerings as they desire. In the latter case, of course, the risk of underutilization of network capacity is transferred to the entity acquiring that capacity; it matters not whether one call or a million calls are transmitted over an intercity DS3 "pipe" leased by a sophisticated switch-based interexchange resale carrier. that carrier must pay the full lease amount regardless of usage levels. In contrast, a "switchless" or traditional "total service" resale carrier, unless it otherwise commits to certain volume levels, pays only for the services actually used by its customers.

The different pricing schemes for unbundled network elements and resale reflect these differences. The Congress clearly differentiated between the provision of "end-to-end" service on the one hand and the leasing of network capacity on the other hand. Under the Congressional scheme, if a new market entrant elected to limit its activities to the performance of the marketing, customer service and billing functions traditionally associated with "total service" resale, it would essentially acquire local service like a retail customer, but at prices that reflected the cost savings it generated for the incumbent LEC. If, however, a new market entrant were to perform the functions and assume the risks of a network operator, albeit a "virtual network operator," it would be entitled to obtain the component parts of its "virtual network" at cost, plus a reasonable profit for the incumbent LEC. Among TRA members, smaller carriers

or carriers that will provide local service principally to enhance the attractiveness of their interexchange offerings and to fortify their relationships with existing interexchange customers will likely opt for "total service" local resale. TRA members that desire to provide local service both on a "stand-alone" basis, as well as in conjunction with interexchange offerings, in selected markets are more likely to elect to assume the substantial additional risk and take on the significant additional responsibilities associated with deployment and operation of "virtual networks."

For much the same reason, offering certain resold services in conjunction with operation of a "virtual network" should be permissible. The determination of how best to structure its operations and service offerings should remain with the competitive provider. Where the carrier elects to deploy "virtual network" facilities, it assumes the risk of capacity underutilization and derives the benefit of cost-based pricing. Where the carrier elects to resell a complete service, its risk is reduced, but its costs of service are increased. Whether the carrier opts for one or the other approach or a combination of both should not matter.

Obviously, for "virtual network" deployment to provide a viable market entry vehicle, unbundling must be adequate to afford new market entrants the opportunity to obtain those network elements they require without being burdened with facilities and equipment they do not need; moreover, such unbundled network elements must be made available at reasonable rates. Section 251(c)(3) mandates the availability of unbundled access to network elements wherever and whenever technically feasible, while Section 252(d)(1) requires that rates for such

unbundled network elements be cost-based.[43] In its comments, TRA endorsed the unbundling proposals of AT&T and MCI and continues to look to the far greater technical resources and capabilities of these parties to fully define "technical feasibility." TRA also endorsed in its comments a total service long run incremental ("TSLRIC") costing methodology for pricing unbundled network elements, concluding that it best satisfied TRA's three key costing principals; it was "forward looking," reflected the most efficient available technology and was predicated on long-run incremental costs.

The incumbent LECs have espoused a dramatically different view. The incumbent LECs seek to minimize the extent of network unbundling, urging an extremely limited interpretation of "technical feasibility," and argue for a costing approach that would maintain the status quo, providing for full recovery of monopoly rents through pricing of unbundled network elements. TRA will leave to others the details of the technical and economic debate surrounding these exceeding complex issues. TRA will limit its discussion to several general observations.

First, with respect to the technical feasibility of network unbundling, network operators, particularly when confronted with imminent competitive intrusions, are the ultimate "Chicken Littles." Perhaps best symbolizing the protective, often hysterical overreaction which is generally forthcoming in such circumstances are AT&T's claims in the 1950's and 1960's that both the simple cup-like device manufactured by Hush-A-Phone Corporation to enhance the privacy of conversations and the Carterphone, a device which enabled a radio transmitter to

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[43] 47 U.S.C. §§ 251(c)(3), 252(d)(1).

interconnect with the telephone network, posed a significant threat to both network reliability and service quality.[44]

Second, TRA submits that the approach to "technical feasibility" outlined by the Commission in the Notice provides a solid foundation upon which the more detailed technical determinations can be made. In the Notice, the Commission tentatively concluded that "the unbundling of a particular network element by one LEC (for any carrier) evidences the technical feasibility of providing the same or a similar element on an unbundled basis in another, similarly structured LEC network" and proposed to impose on LECs that its is "technically infeasible to provide access to a particular network element."[45] This standard provides a quantifiable base upon which additional unbundling can be ordered, while ensuring the availability of at least a threshold set of network elements. This standard would also serve as a useful component of a forward-looking "dynamic" classsification scheme, simplifying in certain instances the showing necessary to establish the technical feasibility of unbundling additional network elements.

Third, at the risk of being repetitous, a threshold degree of unbundling is necessary to ensure that the third of the three vehicles the Congress intended would provide viable means of competitive entry actually achieves this end. If the degree of unbundling is not sufficiently granular, or the guidelines for assessing technical feasibility are not sufficiently detailed, deployment of "virtual networks" will either be ineffective, unduly delayed or both. In

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[44] Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C.Cir. 1956), *on remand* Hush-A-Phone Corp. v. AT&T, 22 F.C.C.2d 112 (1957); Use of the Carterphone Device in Message Toll Telephone Service, 13 F.C.C.2d 430 (1968), *recon. denied* 14 F.C.C.2d 571 (1968).

[45] Notice, FCC 96-182 at ¶ 87.

furtherance of the manifest intent of the Congress. TRA. accordingly, urges the Commission to establish, consistent with the recommendations of AT&T and MCI, a base set of unbundled network elements, provide detailed guidance for assessments of technical feasibility, authorize the States to identify additional network elements that should be offered on an unbundled basis, and create a dynamic process by which further unbundling can be effected.

With respect to the pricing of unbundled network elements, TRA urges the Commission to initiate the incumbent LECs into the harsh commercial world. If competition is to take hold in the local telecommunications market and consumers are to derive benefit from such competitive entry, the principal objective in pricing unbundled network elements cannot be to ensure that incumbent LECs derive revenues from offering such network elements comparable to the revenues they generated prior to enactment of the '96 Act. The Congress has dictated that rates for unbundled network must be cost-based. Presently, many incumbent LEC charges are highly inflated, exceeding cost by a substantial margin: moreover, current equipment and facilities often reflect anything but the most efficient technology available, producing as a result unnecessary and inefficient expenditures. Certainly, charges for unbundled network elements should not simply replicate current charges in a different form or no progress would have been achieved; in the real world. investments must sometimes be written off and costs not fully recovered. Recognizing that the Congress intended to shakeup the telecommunications environment, TRA urges the Commission to be hardnosed and tough in pricing unbundled network elements.

IV. CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to adopt rules and policies in this docket consistent with these reply comments and its earlier filed comments.

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS ASSOCIATION

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